UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLD TRADE CENTER LOWER MANHATTAN DISASTER SITE LITIGATION

ORDER REGULATING ISSUES ON REMAND

21 MC 100 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

By mandate filed September 12, 2014, the Second Circuit Court of Appeals remanded to this Court the question of the proper interpretation of a term in the World Trade Center Litigation Settlement Process Agreement, as Amended (the "SPA") relating to the calculation of Bonus Payments payable to the Tier IV Plaintiffs, and the consideration of extrinsic evidence of the parties' intent. *See In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114 (2d Cir. 2014). Counsel for plaintiffs, Worby Groner Edelman & Napoli Bern LLP ("WGENB"), and counsel for the WTC Captive Insurance Company, Inc. ("WTC Captive") have informed the Court that settlement discussions have ceased to be promising. It appears that an evidentiary hearing will be necessary to resolve the dispute.

This Court has continuing supervisory authority to administer and manage the SPA. *See* Order Approving Modified and Improved Agreement of Settlement, 21 MC 100, ECF No. 2091 (S.D.N.Y. June 23, 2010) (overruling parties' objections to exercise of authority and jurisdiction by the Court over the SPA); *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 124 (remanding case to this Court for consideration of parties' intent with respect to Bonus Payment calculation); *see also* Hellerstein, Henderson, & Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 Cornell L. Rev. 127, 165-71 (2012). Pursuant to this continuing supervisory authority and the need to administer the SPA toward a timely and efficient resolution, the Court hereby regulates the proceedings to govern the Second Circuit's remand of the Bonus Payment issue.

If the terms of an agreement are ambiguous, a Court may consider extrinsic evidence to determine the parties' intent. *See Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010). The Second Circuit held that the SPA was ambiguous with respect to the calculation of the Bonus Payments and instructed this Court to determine whether "the parties had an understanding as to the treatment of plaintiffs whose claims were involuntarily dismissed," and, if so, to give effect to that understanding. *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 124. If the parties did not have such an understanding, the Court may imply a contract term so long as "one may be fairly and reasonably fixed by the surrounding circumstances and the parties' intent." *Id.* (internal citation omitted).

Courts should examine the parties' "objective manifestations of intent" to determine if they intended to enter into a particular contractual obligation. 1 Williston on Contracts § 3:5 (4th ed.). This inquiry into intent is an objective one characterized by "what a reasonable person in the parties' position would conclude given the surrounding circumstances." *Id.* The inquiry is not what a party intended to say, or how he or she may interpret what he or she said, but how a reasonable party would understand what was communicated to it. *See Faulkner v. Nat'l Geographic Soc'y*, 452 F. Supp. 2d 369, 377-78 (S.D.N.Y. 2006) ("[O]nly objective manifestations of intent are relevant under New York law . . . . [S]tatements of subjective intention uncommunicated to the other contracting party are immaterial in construing the terms of the contract."); *but see SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 126 (2d Cir. 2006) ("[W]ith respect to a negotiated agreement, a party's subjective understanding, while not controlling, may shed light on the state of those negotiations and could bear on that party's objective actions."); 2 E. Allan Farnsworth, Farnsworth on Contracts § 7.9 (3d ed. 2004) ("Though it is generally safe to say that a party's 'secret intention' will not carry the day, this is not a safe assertion if it happens that both parties shared the same 'secret intention.'"). Where a key term is omitted from a contract, it may be

implied by the Court based on either (1) what "the parties intended," (2) what "the parties would have intended had they thought about it," or (3) which "terms . . . are fair" so long as "the parties [have not] expressed [an] intent to the contrary." *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 48 (2d Cir. 1988). However, a Court may not imply a contract term based upon its own personal notions of fairness. *See Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 7 N.Y.2d 624, 629 (2006).

With these principles in mind, the Court makes the following rulings:

1. The Court denies as inappropriate and unnecessary the WTC Captive's request that the Court require the parties to institute a separate lawsuit by filing a new complaint.[1]

2. The WTC Captive, by counsel, asks for leave to file a special appearance. The WTC Captive made itself a party to the settlement. *See* Preamble to World Trade Center Litigation Settlement Process Agreement, as Amended (June 10, 2010). Because counsel for the WTC Captive has repeatedly appeared on behalf of her client in this Court and the Second Circuit Court of Appeals, her request for leave to file a formal appearance is not required and, since not required, the request is denied. The WTC Captive will be treated as a party to the extent that its settlement undertakings, on behalf of the City of New York and other insureds, have made it a party.

3. The Parties shall by June 22, 2015 exchange letters identifying each individual that conducted negotiations on behalf of the parties to the SPA, or who was present at such negotiations. Persons that did not conduct, or were not present during, the negotiations need not be identified and shall not be made available for deposition.

4. The Parties shall by July 6, 2015 exchange initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1) identifying all relevant oral, and producing all relevant written, communications

[1] Presumably, if a separate lawsuit would be the appropriate procedure, not one, but thousands of lawsuits would be required, or a freshly-certified class action. The WTC Captive's suggestion is impractical, wasteful, and sure to defeat any notion of fairness and efficiency.

between or among the parties to the SPA, as well as all documents relating to such communications. Internal documents not relating to communications to parties to the SPA need not be identified or produced.

5. The Parties shall appear for a status conference on July 8, 2015 at 2:30 p.m. to regulate further discovery and set a hearing date and time.

6. Finally, the Court is troubled by Paul Napoli's dual role as counsel and witness (and, in some respects, party) in these proceedings. Because Napoli's prior work is now the direct subject of the litigation, the Court wishes to consider whether to appoint special counsel to represent plaintiffs in the discovery and trial of this issue, and welcomes the parties' advice on this subject at the July 8, 2015 status conference, orally and/or in writing served and filed prior to the conference.

SO ORDERED.

Dated: New York, New York
June 8, 2015

ALVIN K. HELLERSTEIN
United States District Judge